MAY 13 1943
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1942

No. 1024

HARRY BECKER,
Petitioner,

vs.

LOEW'S, INCORPORATED, A DELAWARE CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

MOSES LEVITAN,
Counsel for Petitioner.

PRINTED BY CHICAGO LAW PRINTING CO.

INDEX.

	PAGE
Petition	1
Summary and short statement	2
Rulings of the courts below	3
Questions presented	5
Statutes involved	6
Jurisdiction of the court	7
Reasons for allowance of writ	7
Brief in support of the petition	9
Opinion below	9
Jurisdiction	9
Statement of the Case	9
Specifications of Errors	9
Summary of Argument	10
Argument	11
I. The Circuit Court of Appeals erred in construing Section 1b of the Copyright Act by denying the protection thereof to plaintiff's non-dramatic work because it did not contain story, plot or characters. The Act contains no such limitation	11
The Circuit Court of Appeals did not follow the liberal construction of the Copyright Act adopted by this Court	16
II. The decision of the Circuit Court of Appeals is in conflict with Dam v. Kirk La Shelle, 175 Fed. 902, 907 (CCA 2). The absence of a plot is not a bar to the exercise of the exclusive right to dramatize granted by Section 1b of the Act	17
III. The title of a copyrighted work is protected under Sections 1b and 4 of the Copyright Act	18
IV. The exclusive right to dramatize granted by the Copyright Act is entitled to protection under the law of unfair competition	21
Conclusion	23

PAGE

CASES CITED.

American Tobacco Co. v. Werckmeister, 207 U. S. 284 7, 16

Bleistein v. Donaldson Lithographing Co., 188 U. S. 239 19

Dam v. Kirk La Shelle, 175 Fed. 902 8, 12, 17

Eichel v. Marcin, 241 F. 404 15

Gannert v. Rupert, 127 F. 962 23

Gerlach-Barklow Co. v. Morris & Bendien, Inc., 23 F. (2nd) 159 19

Hamilton Shoe Co. v. Wolf Brothers, 240 U. S. 251 22

International Service Co. v. Associated Producers, 273 Fed. 585 22

Kalem Co. v. Harper Bros., 222 U. S. 55 13

Patten v. Superior Talking Pictures, 8 Fed. Supp. 196 22

Sheldon v. Metro-Goldwyn Pictures Corp., et al., 81 F. 2nd 49 17, 18, 19

Washingtonian Co. v. Pearson, 306 U. S. 30 7, 16

STATUTES CITED.

Copyright Act, (U.S.C.A. Title 17) 35 Stat. 1075, 1076

Section 1 6, 11

Section 1a 7, 11

Section 1b 7, 11

Section 4 7, 18

Judicial Code, Sec. 240(a) U. S. C. A. Title 28, Section 347(a) 7

TEXTBOOKS CITED.

Frolich & Schwartz on The Law of Motion Pictures 22

Ladas: International Protection of Literary and Artistic Property (Harvard Studies in International Law III) (1938) Vol. 2 21

Weil on Copyright 14, 19

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1942

No.

HARRY BECKER,

Petitioner,

vs.

LOEW'S, INCORPORATED, A DELAWARE CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

To the Honorable, the Chief Justice, and Associate Justices of the Supreme Court of the United States:

Your petitioner, Harry Becker, respectfully prays for the writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit to review a judgment of that court entered on the twentieth day of February, 1943, in the case numbered and entitled on its docket No. 8073, Harry Becker, Plaintiff-Appellee vs. Loew's, Incorporated, Defendant-Appellant, reversing the decision of the United States District Court in and for the Northern District of Illinois, Eastern Division. A transcript of the record in the case, including the proceedings in said Circuit Court

of Appeals, is furnished herewith. The decision of the Circuit Court of Appeals is reported in 133 Fed. (2d) 889, (R. 314-321).

Summary and Short Statement.

This case involves the construction of Sections 1b and 4 of the Copyright Act (17 U. S. C. A.; 35 Stat. 1075, 1076, Chap. 320) (R. 314). The questions presented are whether Section 1b of the Act, granting to authors the exclusive right to dramatize their non-dramatic works, extends to a book containing neither story, plot nor characters, and whether the title of a copyrighted work is protected under said Section 1b and Section 4, which extends copyright to "all of the writings of an author." Neither of these questions, both of which are of great importance to authors and the public generally, has ever been decided by this Court.

Suit was brought in the District Court of the United States for the Northern District of Illinois, Eastern Division, by Harry Becker, petitioner herein, against Loew's, Incorporated, a Delaware corporation, for infringement under the Copyright Laws of the United States and for unfair competition (R. 2-11).

Plaintiff alleged that his copyrighted book entitled "We Who Are Young" (R. 67, Pltf's Ex. 2, a physical exhibit), published in 1936, was infringed by defendant's motion picture, also entitled "We Who Are Young" (R. 133, Pltf's Ex. 17, a physical exhibit), produced in 1940, and that said motion picture was a dramatization of and unfairly competed with plaintiff's book.

The book discusses economic and social problems from the viewpoint of the younger generation and presents plaintiff's thoughts and ideas on the subject. The portions of plaintiff's book which discuss the issues of the presi-

dential campaign of 1936 and compare the philosophies of Karl Marx and Franklin D. Rooveselt, to which the opinion of the Circuit Court of Appeals refers (R. 314-315), are not at all the basis for the charge of infringement. In the main, the material alleged to be infringed (R. 3-6) is contained in Chapter 15 of the book (Pltf's Ex. 2, a physical exhibit).

The title, "We Who Are Young," had never been used for any book, play, literary work, or motion picture prior to the publication of plaintiff's book (R. 270 (5)). The title was an independent conception of the plaintiff (R. 72) and was also part of the literary material of the book (Pltf's Ex. 2, a physical exhibit, pp. 9 and 216).

Although on July 18, 1940, the defendant was notified in writing of plaintiff's claims (R. 233, 257-258, Deft. Ex. 48), it nevertheless continued to distribute said motion picture (R. 65, 83).

The defendant alleged that its motion picture was the result of independent activities of defendant's employees and one Dalton Trumbo (R. 34, Par. 13). A "rewritten version" of a story, "To Own The World," (R. 215, Deft's Ex. A, a physical exhibit), was introduced in evidence by the defendant as having been purchased from said Dalton Trumbo. The original draft was not produced (R. 159).

Plaintiff testified that the portions of his book alleged to be infringed were the result of his own independent thought and writing (R. 69-72).

Rulings of the Courts Below.

The cause was referred to a Master who took testimony and viewed the picture with sound effects (R. 132). He found the defendant's motion picture was an infringement and dramatization of portions of plaintiff's book and unfairly competed with same (R. 259-273).

The district judge heard the case on objections to the Master's report (R. 276-284), and also viewed the picture (R. 57). He adopted the findings of fact and conclusions of law of the Master (R. 288-289). The judgment of the District Court was that the defendant be enjoined from exhibiting its motion picture and for damages and an accounting (R. 289-290).

Some of the pertinent findings and conclusions of law of the District Court are as follows:

> "The production, portrayal and presentation through the medium of a motion picture of a non-dramatic work, copyrighted under the Act, constitutes an infringement of the exclusive right to dramatize said non-dramatic work" (R. 272, Par. 3).
>
> "The exclusive right given to the owner of a copyrighted work under the Copyright Statute of the United States, to dramatize a non-dramatic work should be given a liberal application to make effective to the copyright owner such right to dramatize" (R. 272, Par. 6).
>
> "To constitute infringement, it is not essential that words, phrases or sentences be copied. The appropriation or unfair use of material portions, treatment, central themes, original thought and ideas may, without the actual taking thereof, constitute an infringement of the copyrighted work" (R. 272, Par. 5).
>
> "Where a title of a copyrighted work is itself part of the copyrighted material of the work, such part so used as the title is protected under the Copyright Statute of the United States" (R. 272, Par. 8).
>
> "The adoption by the infringing work of an identical title is a factor in determining whether there is an infringement, where other similarities exist" (R. 273, Par. 9).

"Access and copying may be proved by circumstantial evidence and may be inferred from a comparison of the two works" (R. 273, Par. 10).

"Defendant's motion picture, 'We Who Are Young' is a dramatization of material portions of plaintiff's copyrighted book, 'We Who Are Young'" (R. 271, Par. 17).

The defendant appealed from the judgment of the District Court to the United States Circuit Court of Appeals for the Seventh Circuit, which reversed the judgment of the District Court (R. 314).

The Circuit Court of Appeals held that the ultimate finding in the case at bar was "a conclusion of law or at least a determination of a mixed question of law and fact" (R. 321). It did not specifically express any dissent from most of the conclusions of law and findings of fact of the District Court, but reached an opposite result by applying to the facts a construction of the Act which was diametrically opposed to that of the District Court. It is thus apparent that the crux of the entire case is whether the District Court or the Circuit Court of Appeals, in making its comparison of the motion picture with the copyrighted work, applied the correct principles of law.

Questions Presented.

1. Whether the exclusive right to dramatize a "non-dramatic work" conferred by Section 1b of the Copyright Act (17 U. S. C. A., 35 Stat. 1075, 1076) includes supplying in such process of dramatization, a plot or dialogue, where they are lacking in such "non-dramatic" work as copyrighted.

2. Whether the principles governing the determination of infringement of the right to multiply copies granted under *Section 1a* of the Copyright Act, which involves com-

parison with the copyrighted work in the form in which it was copyrighted, are applicable to the determination of infringement of the exclusive right to dramatize under *Section 1b* of said Act, which involves a consideration by the Court of the changes necessary to put the copyrighted work into a dramatized form.

3. Whether Section 4 of the Copyright Act which covers "all of the writings of an author," and Section 1b which grants the exclusive right to dramatize, protect the *title* of a book where such title is also part of the literary composition of the book, where such title is an independent conception of the author, and where such title had never been used before as the title for any other book, play or literary work.

4. Whether the evidence was sufficient to support a finding of infringement and unfair competition.

5. Whether objections to a Master's report, which do not point out specifically the errors relied upon and are almost devoid of record references, properly present any questions for the consideration of the Court.

6. Whether the law of unfair competition protects the exclusive right to dramatize a non-dramatic work, granted by Section 1b of the Copyright Act.

7. Whether secondary meaning must be proved for a title which is not descriptive of the contents of the book to which it is applied and which has never before been used as the title for any other book, play or literary work.

Statutes Involved.

The parts of Section 1 of the Copyright Act (17 U.S.C.A.: 35 Stat. 1075, 1076) pertinent hereto are as follows:

> "Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right:

(a) to print, reprint, publish, copy and vend the copyrighted work;

(b) * * * to dramatize it if it be a non dramatic work; * * *''

Section 4 of the Copyright Act (17 U.S.C.A.; 35 Stat. 1076, Chap. 320, Par. 4):

''The works for which copyright may be secured under this title shall include *all of the writings* of an author.'' (Italics ours.)

Jurisdiction of the Court.

The decision below was entered on February 20, 1943.

The Statute under which jurisdiction is invoked is Section 240 (a) of the Judicial Code, as amended by the act of February 13, 1925; Chap. 229, Section 1; 43 Stat. 938; U. S. C. A. Title 28, Section 347 (a).

Reasons Relied on for Allowance of Writ.

1. The Circuit Court of Appeals erred in construing Section 1b of the Copyright Act by denying the protection thereof to plaintiff's non-dramatic work because it did not contain story, plot or characters. The act contains no such limitation. Because of the wide dramatization for motion pictures of books of all types, the construction of Section 1b presents an important question of Federal law which has not been but should be settled by this Court. The strict construction of the Copyright Act adopted by the Circuit Court of Appeals is in conflict with the liberal construction of the Act announced by this Court in *Washingtonian Co.* v. *Pearson,* 306 U. S. 30, 36. (The dissenting opinion of Justice Black was on other grounds.) See also *American Tobacco Co.* v. *Werckmeister,* 207 U. S. 284, 291.

2. The decision of the Circuit Court of Appeals is in conflict with the decision in *Dam* v. *Kirk La Shelle*, 175 Fed. 902 (C.C.A. 2). The Circuit Court of Appeals herein erroneously refused to follow the above case because "plaintiff's book has no plot" (R. 319).

3. The Circuit Court of Appeals erroneously failed to give effect to Section 4 of the Copyright Act, which extends the protection of copyright to "all of the writings of an author," by holding that such protection does not extend to the title (R. 316). This is an important question of Federal law which has not been but should be settled by this Court. The exclusive right to dramatize conferred by Section 1b is ineffective unless it protects the title.

4. The exclusive right to dramatize granted by the Copyright Act is entitled to protection under the law of unfair competition. The decision of the Circuit Court of Appeals, that there was no unfair competition between plaintiff's book and defendant's motion picture failed to give effect to such right to dramatize and was, therefore, probably in conflict with the state law, as yet unannounced by the highest court of the state.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued under the seal of this Court directed to the United States Circuit Court of Appeals for the Seventh Judicial Circuit, sitting at Chicago, Illinois, commanding said court to certify and send to this court on a day to be designated, a full and complete transcript of the record and all proceedings of the Circuit Court of Appeals had in this cause, to the end that this cause may be reviewed and determined by this Court; that the judgment of the Circuit Court of Appeals be reversed, and that petitioner be granted such other and further relief as may seem proper.

MOSES LEVITAN,
Counsel for Petitioner.